No. 83-1555

IN THE

Supreme Court of the United States

October Term, 1983

HOOPA VALLEY TRIBE OF INDIANS,
Petitioners,

v.

JESSIE SHORT, et al.,
Respondents.

PETITIONER TRIBE'S REPLY TO BRIEFS IN OPPOSITION

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I. Respondents Say Nothing That Discounts The Significance of the Question Whether the General Indian Timber Statute, 25 U.S.C. § 407, Allows Federal Courts to Select Those Persons Who Are "Communally Concerned" or Instead Directs Proceeds to Federally-recognized Indian Tribes And Their Members.

No one denies that the central dispute here concerns 25 U.S.C. § 407, the general Indian tribal timber statute under which the Bureau of Indian Affairs administers every tree-growing acre of unallotted land found on Indian reservations across the United States. The dispute potentially affects 50 million acres which yield approximately $70 million in income each year. App. 167. Although the statute provides unambiguously that proceeds from the sales of unallotted timber "shall be used for the benefit of the Indians who are members of the tribe or tribes concerned in such manner as [the Secretary] may direct," the court below held that the term "tribe" included all plaintiffs determined by the court to be "communally concerned with the proceeds," whether or not such persons are members of any tribe. This interpretation is unprecedented, and contradicts the consistent and longstanding Department of the Interior interpretation that the term "tribe" in this and other similar statutes naming "tribes" as beneficiaries, *see* Petition at 8, n.5, refers only to federally-recognized Indian tribal governments and their enrollees. App. 192, 182.

The Government, responding in opposition to the petition, admits that it, too, is "disturbed by this expansive language used by the court of appeals in discussing 25 U.S.C. 407." U.S. Resp. at 15.[1] The Government acknowledges that the

1. The United States submitted a joint response to the petitions in nos. 83-1555 and 83-1638 entitled "Brief For The United States In Opposition." We cite it as "U.S. Resp." Some of the individual plaintiffs in the litigation below, represented by William K. Shearer, filed a brief entitled "Response of Certain Respondents to Petition for a Writ of Certiorari ... and to Motion of Timber Resources Tribes and Other Tribes for Leave to File a Brief as Amicis Curiae ..." We cite this brief as "Pltf's Resp." The other respondents in this proceeding have not filed a brief either opposing or favoring review, although some are petitioners in *Christopher Eddy, et al., v. United States and Hoopa Valley Tribe*, No. 83-1638.

lower court's ruling "would constitute an unprecendented judicial intrusion into matters entrusted to the political branches and to the Indian Tribes," if read to allow a court to ignore "the Secretary's considered judgment and consistent practice that the resources were intended and should be utilized for the benefit of the enrolled members of the Tribe." U.S. Resp. at 16. Nevertheless the Govenment expresses the hope that "the precedential effect of the decision may prove to be confined to the somewhat unusual circumstances of [this] ... Reservation." U.S. Resp. at 13.

This is merely wishful thinking. The lower court's analysis purports to be based on its reading of the general legislative history of 25 U.S.C. § 407, App. 7 and n.8, and there is no intimation in the court's opinion that its jurisdictional reasoning and construction of the statute would not apply to other tribes. The Government does not suggest any legal basis to give it one construction on the Hoopa Valley Reservation and another elsewhere, and the Federal Circuit would be hard pressed to distinguish its *Short* interpretation of § 407. That the lower court may have felt "driven" to reach this "strained" reading of § 407 merely illustrates that hard cases can make bad law. Therefore, the Government's expressed "hope that the judicial intrusion into matters entrusted to the political branches that has occurred in this case might prove to be confined to this case," U.S. Resp. at 18, should give this Court, the Department of the Interior, and the many tribes with timber resources but little comfort.[2] Neither the Hoopa Valley Tribe nor the score

2. The Government speculates that: "[T]he opinion of the court of appeals would not apply to other Reservations where either the Tribe or the Secretary *has* established a membership roll that in turn entitles the enrollees to participate in the distribution of timber revenues under 25 U.S.C. 407. In such a case, a court could not properly second-guess the established membership standards. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978)." U.S. Resp. at 17. But *Short* is precisely such a case: It is undisputed both that the Hoopa Valley Tribe has established its membership roll, *e.g.*, U.S. Resp. at 3, and that the Secretary exercised his power under 25 U.S.C. § 163 to make this tribal roll final as to the Hoopa Valley Reservation in 1952. App. 128. It is precisely because the lower court has ignored *Martinez* and 25 U.S.C. § 407 that the Tribe seeks certiorari.

of timber resource tribes who have sought leave to file a brief as amici curiae in support of petitioner share the respondents' equanimity about this issue. The potential of the decision below for substantial mischief should not be ignored.

II. This Case Strains to the Breaking Point the Limits on Access to Federal Courts Set in *Santa Clara Pueblo v. Martinez* and *United States v. Mitchell I and II. Short* Distends the Boundaries of Claims Court Jurisdiction Far Beyond the Narrow Waivers of Sovereign Immunity Previously Approved by This Court.

Both the Government and the other respondents misconstrue our Tucker Act jurisdiction argument rather than meet it squarely. This is disheartening, because the Government joined us below in moving to dismiss on the same grounds. U.S. Resp. at 9. Of course *United States v. Mitchell (Mitchell II)*, No. 81-1748, ____ U.S. ____, 103 S. Ct. 2961 (1983) recognizes that Tucker Act jurisdiction exists with respect to *certain* claims based on 25 U.S.C. § 407, and we did not contend otherwise. But as the Government understands very well, *Mitchell II* also held that the statute relied upon as the jurisdictional base for a Tucker Act claim must impose a duty whose breach is complained of. This did not present a problem in *Mitchell II* itself,[3] but it does here.

Mitchell II requires that the statute upon which a Tucker Act damages claim is founded "can fairly be interpreted as mandating compensation for damages sustained as a result of a breach of the *duties [it] impose[s].*" *Id.* at 2969 (emphasis added). This is a question of substantial importance because if the statute does not give rise to the *duty* said to be breached, then the claim is not "founded upon" an act of Congress and the Tucker Act does not provide a waiver of sovereign immunity.

The question in *Short* is whether 25 U.S.C. § 407 imposes a duty on the Secretary of the Interior to distribute timber

3. Plaintiffs in *Mitchell II* were the actual Indian allottees seeking to recover damages with respect to their timber. There was no dispute concerning whether or not the duties created by 25 U.S.C. § 406 ran to them. 103 S. Ct. at 2964.

income to persons who are not, and do not claim to be, tribal members. The lower court purported to comply with *Mitchell* by reasoning that if, as it had previously held, Indians of the Addition are entitled to share in timber-sale proceeds, then they must be "members of the tribe" within the meaning of § 407. App. 7, 8. But this assumes the very question to be decided.

Law of the case, particularly when based upon an irrelevant statute that cannot support jurisdiction,[4] does not satisfy the mandate of *Mitchell II*. If the contours of the United States' fiduciary responsibility are allowed to be determined by equitable principles or law of the case, rather than by reference to the particular statute upon which a claim is "founded", then the Claims Court's jurisdiction may expand as far as the Claims Court chooses.

Nor does the jurisdictional inquiry come to an end with a finding that the property is "held in trust," as the lower court suggests. App. 5, 8. This Court foreclosed that argument:

> In contrast to the bare trust created by the General Allotment Act [construed in *Mitchell I*], the statutes and regulations now before us clearly give the Federal Government full responsibility to manage Indian resources and land for the benefit of the Indians. *They* therefore establish a fiduciary relationship and *define the contours of the United States' fiduciary responsibilities.*

Mitchell II, 103 S. Ct. at 2972 (emphasis added). If the lower court ruling stands, the existence of *any* trust relationship will be sufficient to trigger Tucker Act jurisdiction and the court will be free to go outside the alleged statutory foundation to define the contours of the United States' fiduciary responsibilities. This result is presaged by the lower court's alternative holding that jurisdiction exists under 31 U.S.C. § 1321(a),

4. The Court of Claims had consistently held that the Act of April 8, 1864, 13 Stat. 39, was "the source of all claims" in the suit. App. 55, *see also* App. 42 ("The act of 1864 is the basis of the claims ... ."). This Act empowered the President to issue the Executive Order creating the Hoopa Valley Indian Reservation. But this Court has consistently ruled that establishment of such reservations does not create compensable property rights in Indians. *Hynes v. Grimes Packing Co.*, 337 U.S. 86, 103 (1949).

see U.S. Resp. at 11, n.7, a statute which lists 90 different funds only a handful of which belong to Indians.[5]

It is essential to preserve the *Mitchell II* requirement that the statute relied upon create the duty whose breach is asserted, particularly in delicate cases such as *Short*, where inquiry into tribal membership decisions would otherwise be required. As this Court stated in *Martinez* (quoting the district court):

> [T]he ... Act should not be construed in a manner which would require or authorize this Court to determine which traditional values will promote cultural survival and should therefore be preserved ... . Such a determination should be made by the people of Santa Clara; not only because they can best decide what values are important, but also because they must live with the decision every day ... .
>
> To abrogate tribal decisions, particularly in the delicate area of membership, for whatever "good" reasons, is to destroy cultural identity under the guise of saving it.

436 U.S. 49, 54. Here, by contrast, the lower court held:

> [T]he plaintiffs of the following classes are qualified as Indians of the Hoopa Valley Reservation and are therefore entitled, equally with all others qualified, to share the profits of the unallotted trust lands of the Reservation. Judgment is given for these plaintiffs, against the Government and the intervening defendant-Tribe.

4. (Con't)

Furthermore, regardless of the method by which the reservation was established, this Court squarely held in *Mitchell I*, 445 U.S. 535, 545 (1980) that Indians had no right to harvest timber commercially or retain timber proceeds before enactment of 25 U.S.C. § 407 in 1910. Thus an act passed in 1864 has no bearing on the Secretary's duties as to timber proceeds governed by § 407.

5. Each of these funds is created for a specific statutory purpose, so in some situations an underlying statute directs payment and thus could serve as the foundation for Tucker Act jurisdiction. But it does not follow that a plaintiff is entitled to sue the United States for payment out of these trust funds simply because they are held in a bare statutory trust. *See Mitchell II*, 103 S. Ct. at 2972. In addition to the enormous federal retirement funds listed in § 1321(a), hundreds of millions of dollars of tribal money of all descriptions pass through Treasury Department trust

App. 21. That is far too bold a determination to withstand critical examination.[6]

III. Allowing This Unorganized Class of Indian Descendants to Assert Tribal Rights Will Abridge Constitutional Limits and Cause Mischief in the Law.

On the constitutional issue, respondents once again avoid rather than answer our arguments. Respondents claim, for example, that "Petitioner argues that Indians may be defined only in terms of organized tribes." Pltf's Resp. at 15. We actually argue the converse: tribes may be defined only in terms of politically-organized Indians. No respondent denies that the plaintiffs below who satisfy the criteria for "Indians of the Hoopa Valley Reservation" are almost entirely individuals who live outside the reservation in non-Indian communities not only in California but also, for example, in Anchorage, Little Rock, and Philadelphia. This class of plaintiffs has no leadership or government and is not recognized by the United States as a tribe. *See* Petition at 12, n.8.

The Government suggests that, notwithstanding the command of 25 U.S.C. § 407 that timber revenues benefit Indians who are "members of the tribe or tribes concerned," plaintiffs have a "nexus" to the reservation which establishes a reasonable basis for singling them out for distribution of federal benefits.

5. (Con't)

accounts, *e.g.*, proceeds from rights-of-way, oil and gas leases, mineral leases, grazing and timber income. Every day tribal governments make decisions about expenditures of those funds. Most of those decisions are subject to approval of the Secretary of the Interior. Under the lower court's bootstrap approach any plaintiff may sue the United States under the theory that he was entitled to the money and that the Government breached a fiduciary responsibility to him by permitting the Tribe to spend it for a tribal project. In effect, plaintiffs will be able to sue the Government on complaints that stem from *tribal* governmental decisions, whether they be membership decisions or merely budget allocations.

6. Besides the remarkable similarity between what this Court forbade in *Martinez* and what lower court did here, *Martinez* is important for its explanation of sovereign immunity. There, relying on Tucker Act cases, the Court refused to infer a waiver of immunity "[i]n the absence ... of

U.S. Resp. 19-20. However, few of the qualifying plaintiffs have an actual "nexus" to the reservation; instead, their connection derives from their ancestors, often 4-6 generations back.[7] Thus, the key qualification in each category is the language "and their descendants." App. 21-22. This is what the Tribe meant in arguing that the classification imposed by the Court of Appeals was racial and *genealogical* in character.

Both respondents also argue that the Court of Appeals' determination is not objectionable because classifications based on blood quantum are commonplace in federal Indian law. U.S. Resp. 19-20, Pltf's Resp. 15-16. But this ignores the difference between a *tribe* making membership determinations based upon Indian ancestry and the same determination being made by the federal courts. The Bill of Rights does not apply to Indian tribes in the conduct of their governmental affairs, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-58 (1978), but most certainly does apply to the federal government.

These constitutional problems are easily avoided, as they should be. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). The statute at issue here does not purport to convey benefits to Indians unless they are "members of the tribe or tribes concerned." 25 U.S.C. § 407. As we emphasized in our Petition, the term "tribe" as used in the Constitution and in federal statutes clearly has political content. It does not exist in a vacuum.[8] As this Court stated in *White Mountain Apache*

6.(Con't)

any unequivocal expression of contrary legislative intent ..." 436 U.S. at 58-59. While that standard may have been relaxed somewhat in *Mitchell II*, *see* 103 S. Ct. at 2978 (Powell, J., dissenting), the Court has never questioned the holding of *Martinez*.

7. *See* Exhibits 4, 5, 13 in Appendices to the Tribe's Request for Review of Trial Judge's Opinion Setting Standards, filed in the Court of Claims June 25, 1982 and transmitted to this Court pursuant to Rule 19.1.

8. This fact has repeatedly been stressed by this Court in upholding legislation creating benefits or burdens for Indians, and was explicitly relied upon by the Court in *United States v. Mazurie*, 419 U.S. 544, 556-58 (1975). This Court, in rejecting the challenge to a federal delegation of power to

Tribe v. Bracker, 448 U.S. 136, 149 (1980), § 407 was designed to assure that timber profits would "inure to the benefit of the Tribe ... [as] part of the general federal policy of encouraging tribes 'to revitalize their self-government'... ." Thus, the Government's suggestion that the lower court's ruling merely implements the conclusion that "there were two groups of Indians 'concerned' with timber operations on the Reservation", U.S. Resp. at 16, misses the point.[9] "Tribe" was intended by Congress, and is mandated by the Constitution, to refer not to mere "groups of Indians" but rather to a political organization. This difference is substantial, and merits review.

IV. Interlocutory Review on the Merits is Appropriate.

Short, of course, is interlocutory. But the case is in a significantly different posture than it was when the Court previously declined to grant certiorari.[10] As stressed above, the lower court in *Short* has, for the first time, construed and based

8. (Con't)

a "tribe," reasoned that the existence of "independent tribal authority is quite sufficient to protect Congress' decision to vest in tribal councils this portion of its own authority 'to regulate Commerce ... with the Indian tribes.' " 419 U.S. at 557.

9. In cases such as this there are always two "groups," the "in-group" and the others. The difference is that one group is a tribe and the other (a class of plaintiffs) is not. As might be expected, the "out-group" alleges that animus led to their non-enrollment. Similar controversy surrounds every Indian tribe that seeks to draw membership standards. *See generally* Brief of Amici Curiae in No. 83-1555.

10. Earlier denials of certiorari at interlocutory stages do not mean that the matter is final or that a grant of certiorari is now inappropriate. *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 672 n.19 (1979); *Chessman v. Teets*, 354 U.S. 156, 164 n.13 (1957). The *Chessman* court, in granting certiorari after six previous denials emphasized that its "overriding responsibility ... is to the Constitution of the United States, no matter how late it may be that a violation is found to exist." 354 U.S. at 165. Where new issues are presented, legal theories are clarified, or facts are more fully developed, certiorari has been granted despite prior denials. *United States v. Sioux Nation*, 448 U.S. 371, 390-91 (1980); *Smith v. Yeager*, 393 U.S. 122, 123, n.1 (1968) (per curiam).

recovery upon a statute of nation-wide application. The court has clearly set forth the basis upon which it will determine which Indians are "members of the tribe" within the meaning of 25 U.S.C. § 407. That course is so clearly erroneous that certiorari should be granted "to prevent extraordinary inconvenience and embarrassment in the conduct of the cause," *American Construction Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372, 384 (1893). Thus review is appropriate now. *See Gay v. Ruff*, 292 U.S. 25, 30 (1934); *Spiller v. Atchison, Topeka & Santa Fe Ry.*, 253 U.S. 117, 121 (1920).[11]

The Government also suggests that the lower court may have lacked appellate jurisdiction, U.S. Resp. at 2, 8, n.6. The issue of appellate jurisdiction was squarely presented to the Court of Appeals and rejected by it. Section 403(a) of the Federal Court Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 57-58 directs that:

> Any case pending before the Court of Claims on the effective date of this Act ... in which there is pending a request for review, and upon which the court has not acted, shall be transferred to the United States Court of Appeals for the Federal Circuit.

The Court of Appeals has generally read the statute to allow "interlocutory" appeals in cases such as *Short*, which were fully briefed on the effective date of the Federal Court Improvement Act, to be "transferred" and heard on the merits because the certification procedures were not in effect when the appeal was filed, *e.g.*, *Airborne Data, Inc. v. United States*, 702 F. 2d 1350, 1351, 1361 and n.23 (Fed. Cir. 1983); *Hardee v. United States*, 708 F.2d 661, 662-63 (Fed. Cir. 1983);

11. At present, the parties are slogging through the remaining proceedings: case-by-case determinations of the qualifications of the remaining plaintiffs and the calculation of damages. Some 205 motions for a summary determination of eligibility, involving the qualifications of some 422 plaintiffs, are now pending in the Claims Court. Discovery is under way. During the years of expensive, complex litigation which lie ahead, the bulk of the timber-sale proceeds of the Hoopa Valley Reservation will benefit neither the plaintiffs nor the Tribe, since most funds are sequestered, and the decision below will add little to the final posture of this case.

Trans-Lux Corp. v. United States, 696 F.2d 963, 964 (Fed. Cir. 1982); *El Paso Co. v. United States*, 694 F.2d 703, 705 (Fed. Cir. 1982). Although it is true that in other cases, *e.g.*, *Aleut Tribe v. United States*, 702 F.2d 1015 (Fed. Cir. 1983), the court has read the Federal Court Improvement Act the other way, it makes more sense to conclude that when Congress authorized the "transfer" of pending Court of Claims appeals to the Court of Appeals, it did not contemplate that appeals would be dismissed for failure to comply with the certification procedures that were not applicable at the time the original appeals were filed and briefed. Obviously, this will apply only to a small class of transition period cases.[12] Most important, if the lower court lacked appellate jurisdiction, its opinion should be vacated, not allowed to stand. *See Liberty Mutual Ins. Co. v. Wetzel*, 424 U.S. 737 (1976); *see also United States v. Storer Broadcasting Co.*, 351 U.S. 192, 206 (1956) (Harlan, J. concurring in part and dissenting in part).

V. CONCLUSION

For the reasons set forth above the petition should be granted.

Respectfully Submitted,

/s/

Thomas P. Schlosser
Attorney of Record for
Hoopa Valley Indian Tribe

June 6, 1984

12. The recommended decision of the trial judge from which all parties requested review, and which led to the Court of Appeals' decision below, App. A, was plainly intended to be appealable and was briefed as such. It is true that the former trial judge, unfamiliar with the requirements of 28 U.S.C. § 1292(d), failed to include the necessary certification although the decision was technically interlocutory. Judge Schwartz retired two days after ordering entry of a judgment in exactly the form directed by the Court of Appeals. App. 280, *infra*. Now, however, judges of the Claims Court are clearly subject to the certification procedure; there is no reason to impose hardship on the parties whose cases are among the few affected by the transition provisions of the Federal Court Improvement Act.

Appendix

United States Court of Appeals for the Federal Circuit

IN THE MATTER OF CASES)
TRANSFERRED TO THIS COURT)
PURSUANT TO PUBLIC LAW)
97-164, Sec. 403)

Before MARKEY, Chief Judge, FRIEDMAN, RICH, DAVIS, BALDWIN, KASHIWA, BENNETT, MILLER, SMITH and NIES, Circuit Judges.

ORDER

The court having considered the matter of cases pending in the Court of Claims and transferred to this court on 1 October 1982 pursuant to Public Law 97-164, Sec. 403, in each of which cases a decision and opinion had been recommended to the judges of the Court of Claims, IT IS HEREBY ORDERED:

That the United States Claims Court enter and transmit to this court as soon as possible a judgment corresponding to the decision recommended in each such case, which judgment will be deemed to be on appeal to this court.

FOR THE COURT

4 - Oct 82
Date

/s/ Howard T. Markey
Howard T. Markey,
Chief Judge

United States Claims Court

JESSIE SHORT et al.
v. NO. 102-63
THE UNITED STATES

ORDER

Pursuant to the order of the United States Court of Appeals for the Federal Circuit, issued October 4, 1982, IT IS ORDERED that judgment is to be entered in accordance with my report, filed March 31, 1982, recommending a decision to the judges of the United States Court of Claims.

/s/ David Schwartz, Judge
David Schwartz, Judge

JUDGMENT

Pursuant to the above and Rule 58, IT IS ORDERED AND ADJUDGED that judgment is entered this date in this case as provided above.

/s/ Frank T. Peartree
OCT 6 1982 Frank T. Peartree, Clerk